



## English Court considers the meaning of a US Service of Suit clause in a contract of insurance

### ACE CAPITAL LIMITED V CMS ENERGY CORPORATION

Commercial Court – Mr Justice Christopher Clarke – 30 July 2008

*The English High Court has considered the inter-relationship between a US Service of Suit clause and an English Arbitration clause in the context of a policy of insurance. The decision is important in that it found the existence of the US Service of Suit clause in the policy did not override the contractual obligation of the parties to arbitrate all disputes.*

### The insurance

CMS had political risk insurance with insurers, ACE, covering their investments in certain foreign countries. CMS had invested in a natural gas pipeline between Argentina and Chile. When CMS suffered a loss as a result of certain acts of the Argentinean government they sought recovery under their insurance with ACE. They commenced proceedings in the State of Michigan for the insured loss, plus interest at 12% per annum pursuant to a Michigan statute relating to unfair trade practice. They also claimed a jury trial. In response to this ACE sought an anti-suit injunction in the High Court in London in order to restrain CMS from continuing the Michigan action on the basis that the policy contained an arbitration clause.

### The relevant clauses

In deciding the anti-suit injunction, the Court was concerned with the obligations created by two clauses in the policy. The first ('Clause (a)') specified that the policy was to be governed by English law and that all disputes relating to it, or to the determination of the amount of loss under it, should be submitted to arbitration at the London Court of International Arbitration. The second ('Clause (c)') was a Service of Suit clause, specified as being the NMA 1998 clause. This specified that in the event of Underwriters failing to pay any claim under the policy, Underwriters agreed to submit to the jurisdiction of a court of competent jurisdiction within the United States.

There was a third clause ('Clause (b)') relating to the interaction of the two clauses. This stated:

*"(b) The parties hereto agree that the speedy resolution of any disputes between them to be had as a consequence of this clause is a mutual and material inducement to enter into this Policy and that this in no way infringes on any rights accorded in the Service of Suit clause of this Policy the effect of which is to provide without waiver of any defence an ultimate assurance of the amenability of Underwriters to process certain courts."*

# The issue

At first blush, Clauses (a) and (c) seemed to contradict each other. Therefore, the issue was whether CMS were entitled to commence the action in Michigan on the basis of the Service of Suit clause, even though the policy also contained a clause requiring all disputes to be arbitrated. Clarke J focussed on the construction of the Service of Suit clause in determining this issue.

Both parties relied on the wording in Clause (b) in their submissions. ACE argued that the '*ultimate assurance*' of Clause (c) had to be contrasted with the primary forum of the arbitral tribunal. Arbitration was the appropriate forum for an initial dispute on the merits of the claim. CMS relied on the language that the Arbitration clause '*in no way infringes*' on the rights granted in Clause (c), one such right being the right to require Underwriters to submit to a US court of competent jurisdiction. If CMS did not avail themselves of this right then the Arbitration clause would apply.

## Clarke J's four factors

Clarke J identified four factors on which he based his decision in this case, which were:

(i) *The policy wording had been agreed in the context of a strong legal policy in favour of arbitration in both England and the US.* Clarke J spent a considerable amount of time reviewing English and American authorities on the effect of Service of Suit clauses and mandatory Arbitration clauses. He identified a line of decisions of the Federal Courts in the US and the Court of Appeal and House of Lords in England, including the recent decision in *Premium Nafta Products Ltd v Fili Shipping Co Ltd [2007] UKHL 40*, that gave Arbitration clauses precedence when there was a dispute over the correct forum for dispute resolution.

(ii) *The interpretation of Service of Suit clauses in US case law.* Clarke J referred to the significant body of case law dealing with the interaction of mandatory Arbitration clauses and Service of Suit clauses in the US. This case law demonstrated that there was no inconsistency in having both clauses in a policy. The Service of Suit clause had been interpreted as an intention that Underwriters were subject to the jurisdiction of the US court for the purposes of enforcing an award determined in accordance with the

arbitration provision. So to that extent the clauses worked in conjunction with each other.

(iii) *The intention of the parties as set out in Clause (b).* Clarke J looked at two aspects of this clause. First, he considered the wording '*without waiver of any defence*' which he considered had been drafted specifically with the US in mind, where the requirement to refer disputes to arbitration could be a defence to court proceedings commenced there. The intention was that the Service of Suit clause did not exclude a claim from being determined in arbitration. Secondly, he held that '*ultimate assurance*' referred to the end of the process in getting payment from Underwriters rather than the start of the process in establishing a claim.


(iv) *The absence of an undertaking in the Service of Suit clause that all disputes are to be determined in accordance with the law and practice of the relevant clause.* This was in contrast to the Arbitration clause which was an agreement that the merits of any dispute were to be determined by arbitration with reference to English law.

## The decision

On the basis of these four factors Clarke J concluded that the Arbitration clause applied to all disputes and that the Service of Suit clause did not entitle CMS to commence proceedings in the Michigan court. This construction meant that the Service of Suit clause still applied in a number of instances including an order to compel arbitration, to enforce an arbitration award or to confirm jurisdiction on a US court in the event that the parties agree to dispense with arbitration.

## Comment

The Commercial Court has previously considered the interplay between an Arbitration/Governing law and Jurisdiction clause and a Service of Suit clause in the case of *Catlin Syndicate Ltd v Adams Land & Cattle [2007] 1 Lloyd's Rep 96*. In that case, the wording provided the parties with two clear alternatives as to the jurisdiction in which they could commence proceedings. The decision there ultimately came down to one of forum conveniens which was not the basis on which the ACE decision was determined.



Both of these cases deal with the proper construction of the law and jurisdiction provisions of contracts in circumstances where the policy drafting appears to contain obvious inconsistencies in wording. They emphasise the importance of technical wording review when drafting policy wording, in particular where it is proposed to use standard form clauses.

If you require any further information in relation to the way in which these developments impact upon your business please contact Nicholas Bradley, David Breslin, William Sturge or Viran Ram on 020 7379 0000 at Lawrence Graham LLP.

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